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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH ROTENBERG and DOES 1-100,)
Plaintiffs,) No. C-09-2914 SC
)
v.) ORDER GRANTING MOTION
BRAIN RESEARCH LABS LLC, a Delaware) TO REMAND
LLC, et al.,)
Defendants.)

)

I. INTRODUCTION

Plaintiff Joseph Rotenberg ("Plaintiff") brought this putative class action in California State Court, alleging six state-law causes of action, several of which implicate or invoke in some way provisions of federal law. See Notice of Removal ("NoR"), Ex. 1 ("Compl."). Defendants, Brain Research Labs LLC, et al. ("Defendants"), removed the action to this Court. Plaintiff has filed a Motion to Remand, Docket No. 12, and a Memorandum in Support ("Pl.'s Mem."), Docket No. 13. Defendants filed an Opposition, Docket No. 26, and Plaintiff filed a Reply, Docket No. 28. Defendants also filed a Motion for Transfer of Venue, which has been fully briefed. Docket Nos. 20, 23, 30. Having considered the briefing submitted by both parties, the Court concludes that it lacks subject matter jurisdiction over this action, and GRANTS Plaintiff's Motion to Remand. The Court

1 DISMISSES Defendants' Motion for Transfer of Venue AS MOOT.
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3 **II. BACKGROUND**

4 Brain Research Labs LLC ("BRL") is a Delaware limited
5 liability corporation ("LLC") that is headquartered in Spokane,
6 Washington. Compl. ¶ 5. According to Plaintiff, it is dominated
7 and controlled by a number of partners and members (who are also
8 named as Defendants), including 20/20 Brainpower Partners LLC,
9 which Plaintiff alleges is a California LLC. Id. Plaintiff
10 claims that BRL has caused false and misleading claims to be made
11 about its product, Procera AVH (the "product"), and has sold this
12 product without warnings about its adverse effects. Id.
13 Plaintiff also names as Defendants seven individuals, including
14 three California residents, who have allegedly endorsed Procera
15 AVH. Id. ¶ 8.

16 Plaintiff is alleging that use of the product "may result in
17 adverse health effects, and may interfere with a variety of
18 prescription drugs," and that Defendants marketed the product
19 without "clear and reasonable warnings regarding the adverse
20 health effects." Id. ¶ 26. According to Plaintiff, Defendants
21 are deceiving the public of California by failing to disclose
22 these risks, and by describing the product as a "dietary
23 supplement" rather than a "drug" in violation of both California
24 and federal law.¹ Id. ¶¶ 27-28. Plaintiff also claims that
25 Defendants used, in advertisements, a number of misleading claims

26 ¹ Plaintiffs refer to the definition of "drug" under the
27 California Health and Safety Code section 109925, as well as the
definition of "dietary supplement" under 21 U.S.C. § 321(ff)(1).

1 about the benefits of the product, including the positive effects
2 that it could have towards the treatment of particular diseases.
3 Id. ¶¶ 29–31.

4 The Complaint itself has six causes of action. The first
5 five causes of action attempt to state claims under California's
6 Unfair Competition Law ("UCL"), California Business and
7 Professions Code sections 17200 et seq. This provision requires a
8 plaintiff to establish either an (1) "unlawful, unfair, or
9 fraudulent business act or practice," or (2) "unfair, deceptive,
10 untrue or misleading advertising." Cal. Bus. & Prof. Code
11 § 17200. In order to support his first, second, fourth, and fifth
12 causes of action for violations of the UCL, Plaintiff has cited
13 and relies in part on various federal statutes and regulations
14 that govern the labeling of food, drugs, and imported goods.
15 Compl. ¶¶ 36, 47, 49, 61, 63, 71. Plaintiff's sixth cause of
16 action, for violation of the California Consumer Legal Remedies
17 Act, Cal. Civ. Code §§ 1750 et seq., alleges various facets of a
18 "campaign to mislead consumers," and also cites a violation of
19 federal law as support. Compl. ¶ 78.

20 Defendants removed this action on two independent grounds.
21 See NoR ¶ 7. First, Defendants invoke provisions of the Class
22 Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Id. ¶ 12.
23 Second, Defendants contend that this Court has original
24 jurisdictions under 28 U.S.C. 1441(b), because Plaintiff's claims
25 "arise under" the laws of the United States. Id. ¶ 17.

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1 **III. LEGAL STANDARD**

2 Under 28 U.S.C. § 1441(a), a suit filed in state court may be
3 removed to federal court if the federal court would have original
4 jurisdiction over the action in the first instance. If a district
5 court finds that it lacks subject matter jurisdiction, then it
6 must remand the action to state court, as "removal is permissible
7 only where original jurisdiction exists at the time of removal or
8 at the time of entry of final judgment." Lexecon, Inc. v. Milberg
9 Weiss Bershad Hynes & Lerach, 523 U.S. 26, 43 (1998).

10 **IV. DISCUSSION**

11 **A. CAFA**

12 CAFA "vests the district court with 'original jurisdiction of
13 any civil action in which the matter in controversy exceeds the
14 sum or value of \$5,000,000, exclusive of interest and costs, and
15 [where the action] is a class action in which' the parties
16 satisfy, among other requirements, minimal diversity." Abrego v.
17 The Dow Chemical Co., 443 F.3d 676, 680 (9th Cir. 2006) (quoting
18 28 U.S.C. § 1332(d)). "Where the complaint does not specify the
19 amount of damages sought, the removing defendant must prove by a
20 preponderance of the evidence that the amount in controversy
21 requirement has been met." Id. at 683. "Minimal diversity"
22 requires only that any putative class member is a citizen of a
23 different state than any defendant. See 28 U.S.C.
24 § 1332(d)(2)(C).

25 Even if a suit meets all of the basic conditions for a class
26 action under CAFA, subsection 1332(d)(4) states that "[a] district
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1 court shall decline to exercise jurisdiction" over certain
2 disputes that are local in character. These include class actions
3 where no similar class action has been filed in the preceding
4 three years, and:

5 (I) greater than two-thirds of the members of
6 all proposed plaintiff classes in the
7 aggregate are citizens of the State in which
8 the action was originally filed;
9 (II) at least 1 defendant is a defendant --
10 (aa) from whom significant relief is sought
11 by members of the plaintiff class; (bb) whose
12 alleged conduct forms a significant basis for
the claims asserted by the proposed plaintiff
class; and (cc) who is a citizen of the State
in which the action was originally filed; and
(III) principal injuries resulting from the
alleged conduct or any related conduct of
each defendant were incurred in the State in
which the action was originally filed.

13 28 U.S.C § 1332(d)(4)(A).

14 Whether CAFA applies to the present suit is largely a
15 question of how Plaintiff's Complaint is construed. Defendants
16 assert that Plaintiff, by his Complaint, purports to represent two
17 nationwide classes, one consisting of "all persons who purchased
18 the Product within the last four years" and another consisting of
19 "all persons who purchased the Product within the last three
20 years." Compl. ¶¶ 15, 16; Opp'n at 3.² Plaintiff claims that he
21 intended to bring this suit solely on behalf of California
22 purchasers. Pl.'s Mem at 2. He cites the fact that the Complaint
23 repeatedly asserts that Defendants' conduct "will irreparably harm
24 Plaintiffs and the general public of California." Compl. ¶¶ 41,
25

26 ² Plaintiff seeks to establish these two nearly identical
27 classes under two different provisions of California law, section
382 of the California Code of Civil Procedure and section 1781 of
the California Civil Code. Compl. ¶¶ 15-16.

1 50, 57, 66, and 73. Plaintiff's Complaint is, for the most part,
2 a mixed bag. In one paragraph it vaguely suggests a class that is
3 not bounded by any specific geographic designation, and in the
4 next it offers a specific but fleeting reference to the California
5 public. For example, Plaintiff's second prayer for relief calls
6 for restitution to "any purchaser of the Product," but his third
7 prayer requests that Defendants "notify each and every customer .
8 . . who was a resident of California at the time of purchase of
9 the Product . . . and thereby provide such customers an
10 opportunity to obtain restitution . . ." Compl. at 31-32.

11 Although the Complaint is not a model of clarity, the Court
12 finds that the Complaint asserts claims only on behalf of
13 California purchasers. This is the most reasonable of the two
14 possible readings of the Complaint. To the extent that the
15 Complaint does suggest a nationwide class, it is done only
16 implicitly. On the other hand, the references to the California
17 public are explicit and would be incoherent if found in a
18 Complaint purporting to speak for the public nationwide. The
19 prayer that notice be provided only to California purchasers would
20 be particularly nonsensical under Defendants' reading. Finally,
21 Plaintiff's interpretation of his own Complaint is bolstered by
22 the fact that it invokes only causes of action founded in
23 California statutory law. Compl. ¶¶ 35-81.

24 Once Plaintiff's Complaint is so construed, this creates
25 several problems for Defendants' assertion of federal jurisdiction
26 under CAFA. First, Defendants' only basis for claiming that
27 damages will exceed five-million dollars is that BRL has sold
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1 "well over \$5 million of the Product since February 2007." NoR
2 ¶ 14; see also John Arnold Decl. ¶ 3.³ This statement, which is
3 not limited geographically, provides the Court with no basis for
4 concluding that California residents have purchased more than
5 five-million dollars of the product in the last four years.
6 Defendants have therefore failed to meet their burden of
7 establishing that the amount at issue in this suit satisfies CAFA.

8 Second, if Plaintiff is bringing an action only on behalf of
9 California residents, then "greater than two-thirds of the members
10 of all proposed plaintiff classes in the aggregate are citizens of
11 the State in which the action was originally filed." 28 U.S.C
12 § 1332(d)(4)(A). As noted in Part II, supra, several key
13 defendants are California citizens for the purpose of
14 jurisdiction.⁴ Finally, the principal injuries would have likely

15 ³ John Arnold, who "manage[s] the campaign and day-to-day
16 operations and advertising/marketing" for BRL, submitted a
declaration in support of the Opposition. Docket No. 27.

17 ⁴ Specifically, 20/20 Brain Power Partners LLC, 20/20 Brain
18 Power Founders LLC, Medhealth Direct, Inc., Arnold Bresky, Cynthia
19 Watson, and Cheryl Sindell (five of the fifteen Defendants) are
20 alleged to hail from California. See Compl. ¶ 1. Defendants have
not sought to challenge whether the conduct of these Defendants is
21 a "significant basis" for Plaintiff's claims or whether the relief
sought from them is "significant," as required by 28 U.S.C.
22 § 1332(d)(4)(A). Several Individual Defendants are apparently
being charged with liability on the basis of their own independent
23 conduct. See id. ¶ 8. As the Court reads the Complaint, the
California Defendants are alleged to be at least as culpable as the
similarly situated defendants. It is questionable whether certain
24 of these defendants may ultimately be liable, in part because the
producer of the product in question, BRL, is an LLC. However, the
question is whether Plaintiff is seeking "significant relief" from
25 these Defendants, and not whether "significant relief may be
obtained." See Coffey v. Freeport McMoran Copper & Gold, No. 09-
26 6106, 2009 U.S. App. LEXIS 19996, *12 (10th Cir. Sept. 4, 2009).
In addition, "removal statutes are strictly construed against
27 removal," Luther v. Countrywide Home Loans Servicing LP, 533 F.3d
1031, 1034 (9th Cir. 2008), and removal "must be rejected if there

1 occurred in California. Consequently, this suit satisfies the
2 local suit exception to CAFA, and this Court may not exercise
3 jurisdiction over the action absent some other basis.

4 **B. Jurisdiction "Arising Under" the Laws of the United**
5 **States**

6 The Supreme Court has made it clear that invoking a federal
7 issue or provision is not "a password opening federal courts to
8 any state action embracing a point of federal law." Grable & Sons
9 Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314
10 (2005). Instead, a cause of action "arises under" the laws of the
11 United States, for the purposes of construing 28 U.S.C. § 1331,
12 only if "a well-pleaded complaint establishes either that [1]
13 federal law creates the cause of action or that [2] the
14 plaintiff's right to relief necessarily depends on resolution of a
15 substantial question of federal law." Franchise Tax Bd. v.
16 Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983).

17 Plaintiffs allege a hodgepodge of violations of California
18 and federal law. The federal laws all relate to the
19 categorization of, approval requirements for, or labeling of food,
20 drugs, or other products.⁵ None of these provisions allow for

21 is any doubt as to the right of removal in the first instance."
22 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). Given
23 these considerations, the Court finds that CAFA's local suit
exception applies.

24 ⁵ To borrow from Defendants' summary, Plaintiff's Complaint
25 invokes the following federal statutes and regulations:

26 • 21 U.S.C. § 331 (unlawful sale of Product as a
27 "safe and effective drug" without F.D.A. approval);
28 • 21 U.S.C. § 321(ff)(1) (definition of non-drug
"dietary supplement," which allegedly excludes the
Product because two component substances require

1 private rights of action. See, e.g., PDK Labs v. Friedlander, 103
2 F.3d 1105, 1113 (2nd Cir. 1997) (holding that no private right of
3 action exists under the Federal Food, Drug, and Cosmetic Act). As
4 such, there is no question as to whether a well-pleaded complaint
5 would have invoked a federal cause of action (per the first prong
6 of the test in Franchise Tax Board). The absence of a federal
7 cause of action is not an absolute bar on federal jurisdiction,
8 but may be read as "a missing welcome mat, required in the
9 circumstances, when exercising federal jurisdiction over a state
10 misbranding action would have attracted a horde of original
11 filings and removal cases raising other state claims with embedded
12 federal issues." Grable, 545 U.S. at 318 (interpreting Merrell
13 Dow Pharmas. v. Thompson, 478 U.S. 804 (1986)).

14 Having concluded that Plaintiff has not and could not have
15 stated a federal cause of action, the issue must turn on whether
16 the Complaint includes "allegations of federal law that are
17 essential to the establishment of his claim." Lippitt v. Raymond
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19 "considerable laboratory manipulation and high
20 degree of manipulation");
21 • 21 U.S.C. § 342(f)(1)(a) (definition of
22 "adulterated food," which allegedly includes the
23 Product because it contains "unapproved drugs that
24 pose the risk of significant and unreasonable
25 injury");
26 • 19 U.S.C. § 1304 ("country of origin" labeling
requirements);
• 21 C.F.R. § 101.15(a) (safety information labeling
requirements);
• 21 C.F.R. § 101.9 ("food" labeling requirements);
and
• 16 C.F.R. § 255.3 (requirements for expert
endorsements).

27 Opp'n at 2-3 (citing Compl. ¶¶ 8, 27, 31-34, 35-81).
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1 James Fin. Servs., Inc., 340 F.3d 1033, 1041 (9th Cir. 2003).
2 This is sometimes referred to as the "artful pleading doctrine,"
3 as the focus is often on whether the plaintiff has attempted to
4 avoid jurisdiction by omitting federal allegations, or "whether
5 [the plaintiff] has artfully phrased a federal claim by dressing
6 it in state law attire." Id., 340 F.3d at 1041. There is no
7 "single, precise, all embracing" test to determine this. Grable,
8 545 U.S. at 314. Instead, each court must examine the particular
9 complaint, and ask "does a state-law claim necessarily raise a
10 stated federal issue, actually disputed and substantial, which a
11 federal forum may entertain without disturbing any congressionally
12 approved balance of federal and state judicial
13 responsibilities[?]" Id. The Court finds that, in the case of
14 this Complaint, it does not.

15 The Complaint unabashedly invokes federal law to support five
16 of its six causes of action. However, none of these claims
17 necessarily turns on a federal question. "[T]he Ninth Circuit has
18 made clear that a claim supported by alternative theories in the
19 complaint may not be characterized as 'necessarily federal' unless
20 the federal law question is essential to each of those theories."
21 T&E Pastorino Nursery v. Duke Energy Trading & Marketing LLC, 268
22 F. Supp. 2d 1240, 1248 (S.D. Cal. 2003) (citing Duncan v.
23 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996)); see also Mangini v.
24 R.J. Reynold Tobacco Co., 793 F. Supp. 925, 927-28 (N.D. Cal.
25 1992) (noting that UCL allegations predicated in part on Federal
26 Cigarette Labeling and Advertising Act did not confer
27 jurisdiction). Each cause of action in Plaintiff's Complaint

1 offers several different theories, and no cause of action would be
2 completely toothless if the references to federal provisions were
3 erased. For example, Plaintiff's first cause of action includes
4 an allegation that Defendants violated 21 U.S.C. § 331, which
5 prohibits, among other things, the misbranding of any food or
6 drug. Compl. ¶ 36. It also rests on a California statute that
7 prohibits false advertising with respect to food and drugs. Id.
8 (invoking Cal. Health & Safety Code § 109925).

9 Similarly, Plaintiff supports its fourth cause of action
10 under the UCL by referring to two specific federal labeling
11 provisions that require products manufactured abroad to be labeled
12 as such, 19 U.S.C. § 1304, and require warning labels to be
13 printed in sufficiently large type, 21 C.F.R. § 101.15(a). Compl.
14 ¶¶ 61, 63. However, even if these claims prove fruitless,
15 Plaintiff may still be able to state a claim under the UCL,
16 because the UCL "is written in the disjunctive, it establishes
17 three varieties of unfair competition-acts or practices which are
18 unlawful, or unfair, or fraudulent." Lippett, 340 F.3d at 1043
19 (quoting Cel-Tech Communs., Inc. v. Los Angeles Cellular Tel. Co.,
20 Cal. 4th 163, 180 (1999)). Indeed, the fourth cause of action
21 not only tries to show that Defendants' practices are unlawful by
22 their violation of federal law; it explicitly sets out at least
23 two "separate and independent" theories of fraud based on
24 Defendant's labeling practices. Compl. ¶¶ 62, 64-65. In other
25 words, Plaintiff has pled that the Defendants' activities were
26 "unfair or deceptive even if not unlawful." C.f. T&E Pastorino
27 Nursery, 268 Fed. Supp. 2d at 1249 (quoting Hendricks v. Dynegy

1 Power Mktg., Inc., 160 F. Supp. 2d 1155, 1161 (S.D. Cal. 2001)).

2 The Supreme Court has found that similar state-law claims
3 that rest upon violations of federal food and drug labeling
4 requirements do not confer federal jurisdiction. See Merrell Dow,
5 478 U.S. 804 (interpreting complaint that used mislabeling to
6 establish negligence as a matter of law). Plaintiff is not
7 treading upon an area of law that is peculiarly federal in
8 character. C.f. Garble, 545 U.S. at 310 (noting the "national
9 interest in providing a federal forum for federal tax litigation,"
10 where quiet title action turned on this issue). Nor is this an
11 area of law that has been assigned to the exclusive jurisdiction
12 of the federal courts. C.f. Sparta Surgical Corp. v. Nat'l Ass'n
13 of Sec. Dealers, 159 F.3d 1209, 1212-13 (9th Cir. 1998) (noting
14 that federal courts had exclusive jurisdiction over claims
15 concerning duties created by a securities association registered
16 with the Securities and Exchange Commission). Instead, as
17 Plaintiff's Complaint amply demonstrates by its clusters of
18 parallel citations, the area of drug labeling is policed by both
19 state and federal law. Congress has not conferred on federal
20 courts the authority to enforce the labeling requirements on which
21 Plaintiff's rely, but Defendants' position would give plaintiffs
22 everywhere (or at least in California) a relatively
23 straightforward path to federal courts. At the same time,
24 California has created both similar advertising restrictions, see,
25 e.g., Cal. Health & Safety Code § 109925, and a cause of action
26 that may be used to enforce them, Cal. Bus. & Prof. Code §§ 17200
27 et seq. Consequently, this Court's finding comports with the

1 congressionally approved balance of federal and state judicial
2 responsibilities.

3

4 **V. CONCLUSION**

5 Plaintiff's Complaint does not implicate a federal question,
6 nor does it necessarily trigger federal jurisdiction under the
7 Class Action Fairness Act. Consequently, this Court lacks
8 jurisdiction over Defendants' Motion for Transfer of Venue.
9 Defendants' Motion for Transfer of Venue is therefore DISMISSED AS
10 MOOT. In addition, Plaintiff's Motion to Remand is hereby
11 GRANTED. This action shall be REMANDED to Superior Court of
12 California, County of Marin.

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IT IS SO ORDERED.

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September 15, 2009

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UNITED STATES DISTRICT JUDGE

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